FOR ARGUMENT

IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

No. 79-492

ROBERT MICHAEL FUNGAROLI,

Appellant,

v.

JUDITH DIANE FUNGAROLI,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF
NORTH CAROLINA

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

This is a civil action wherein the plaintiff [husband-father] filed a custody suit in the District Court of Forsyth County on December 21, 1977. (A p. 3). On the same day an *ex-parte* temporary custody order was signed by The Honorable Gary B. Tash awarding temporary custody to plaintiff. (A p. 8). On February 17, 1978, the defendant [wife-mother] served upon plaintiff an answer and counter-claim (A p. 22) seeking, *inter alia*, custody of the minor

child, temporary alimony, and permanent alimony.[1]

On February 18, 1978, The Honorable Gary B. Tash entered an *ex-parte* order allowing the defendant specific visitation privileges with her child on Sunday, February 19 and Wednesday, February 22 and for "a like period of time on each and every Sunday and Wednesday thereafter until further order of this Court". (A p. 13). Following the plaintiff's failure to comply with the Court's order on February 19 and February 22, respectively, the defendant did, on the 24th day of February, 1978, move the court for an order requiring plaintiff to appear and show cause why he should not be held in contempt of court for willfully failing and refusing to obey the court's order of February 18. The motion further requested the court to enter an order requiring the plaintiff to produce the minor child at the show cause hearing and to enter a preliminary injunction requiring the plaintiff "not to remove said child from Forsyth County without the permission of the court". Copies of the motion and the accompanying affidavit of the defendant (A p. 14–15) were served upon both the plaintiff and his then attorney of record. The defendant's motion was made on the same day that she received by certified mail a summons and petition from the Juvenile and Domestic Relations Court of Fairfax County, Virginia notifying her that her husband had, on the 21st day of February, 1978, filed a second action for custody of the parties' minor child. (A p. 15–19).

As a result of defendant's motion, the court did, on February 24, 1978, enter an order requiring the plaintiff to

[1]As will be noted on the original of the answer and counterclaim, the pleading was first filed on February 17, 1978. For reasons unknown to counsel, that date was subsequently "x'd" out and the pleading was restamped February 28, 1978.

appear on the 6th day of March, 1978, and show cause why he should not be held in contempt of court for violation of the order previously entered on February 18 regarding visitation. The order (A p. 20–21) further required the plaintiff to bring with him to the hearing the minor child. As was the case with the defendant's Motion to Show Cause, the court's order of February 24th was served upon the plaintiff at his new address in Springfield, Virginia, as well as upon his attorney of record in the North Carolina proceeding. When the plaintiff failed to appear before the Court on March 6, 1978 (A p. 46) the court went on to find as a fact that "at no time subsequent to February 18, 1978, had the plaintiff complied in any respects with the order of this court of the same date", and that "the plaintiff has fled to the State of Virginia for the sole purpose of obstructing the Order of this court dated February 18, 1978". (A p. 47). The court then proceeded to adjudge the plaintiff in contempt of court, but provided that the plaintiff could "purge himself of both civil and criminal contempt by personally appearing before the Court on or before March 20, 1978". (A p. 48). The plaintiff did not so appear.

Prior to the March 6 hearing, *viz.*, March 1, 1978, the defendant, through counsel, filed a motion for alimony *pendente lite.* (A p. 35). The motion was accompanied by an affidavit from the defendant (A p. 37), as well as copies of the verified pleadings filed by the plaintiff in the Domestic Relations Court of Virginia (A p. 15–19) indicating that plaintiff had now taken up permanent residence in Springfield, Virginia. Because of the plaintiff's prior refusals to obey court orders requiring him to appear, and because counsel for defendant was informed by plaintiff's North Carolina business partner that plaintiff was contemplating a transfer of all his North Carolina business

interests for the purpose of avoiding and obstructing any alimony order which might be forthcoming,[2] counsel for defendant chose to avail himself of the provisions of N.C.G.S. §50-16.8(e) which provides that no notice need be given to a supporting spouse who has fled the state and abondoned the dependant spouse. Upon the court's finding that "the plaintiff, Robert Michael Fungaroli, has left the State of North Carolina and is living presently in Springfield, Virginia", and that the plaintiff had: abandoned the defendant, maliciously turned her out of doors; rendered such indignities to the person of the defendant as to render her condition intolerable and her life burdensome; and, had willfully failed to provide the defendant with the necessary subsistence according to his means and condition,[3] the court entered an order requiring plaintiff to pay the defendant temporary alimony in the amount of $100.00 per week. Thereafter, on August 8, 1978, the court entered an order awarding custody of the minor child to the defendant wife.

From the orders of March 1 and August 8, plaintiff appealed to the North Carolina Court of Appeals. On March 20, 1979 that Court affirmed the decision of the trial court granting temporary alimony. 40 N.C. App. 397, 252 S.E.2d 397. On October 2, 1979 the Court of Appeals in an unpublished opinion (Brief App. A) affirmed the trial

[2]Indeed, plaintiff subsequently transferred his entire North Carolina assets to a corporation run by his father, a resident of Virginia. As a result thereof, defendant now has pending in the Superior Court of Forsyth County an action to set aside the alleged fraudulent conveyance. *Fungaroli* v. *Fungaroli*, et al., File No. 79 CVS 3683.

[3]The defendant was involuntarily hospitalized from December 21, 1977 until February 15, 1978, pursuant to a petition taken out by the plaintiff.

court's award of custody to defendant. The plaintiff has yet to comply with either of these decisions, despite the North Carolina Supreme Court's decision to deny review in each.[4]

ARGUMENT

I.

THIS COURT SHOULD REFUSE TO EXERCISE JURISDICTION HEREIN—PURSUANT TO 28 U.S.C.A. §§1257(2), 1257(3)—INASMUCH AS THE CONSTITUTIONALITY OF N.C.G.S. §50-16.8(e) HAS NOT BEEN PROPERLY PRESENTED TO THE APPELLATE COURTS OF NORTH CAROLINA AND HAS NOT BEEN PASSED UPON BY THEM.

Appellant contends that "[t]his action is an appeal from *a holding* by the North Carolina Court of Appeals and the North Carolina Supreme Court *that a statute is constitutional* under the Constitution of the United States of America". (Brief of Appellant, p. 1) (emphasis supplied). At the outset it will be easily noted that neither the decision of the North Carolina Court of Appeals (Jurisdictional

[4]Indeed, on January 21, 1980, the Assistant District Attorney for Forsyth County sought and obtained true bills of indictment against plaintiff, his mother and father, charging each with "Transporting Child Outside the State With Intent to Violate Custody Order". (Brief App. B, pp. 1b, 2b, 3b). The indictments have yet to be served on appellant inasmuch as his present whereabouts is unknown. Furthermore, as of March 13, 1980, the arrearage under the temporary alimony order totalled $10,600.00.

Statement, App. A, p. 5a) nor the Judgment of the North Carolina Supreme Court dismissing the appeal to that court (*id.* at 8a) rules in any way upon the constitutionality of §50-16.8(e). The decision of the North Carolina Court of Appeals makes no reference whatsoever to the "constitutionality" of anything; indeed, the opinion is bereft of the word itself. In *Street v. New York*, 394 U.S. 576, 581-582 (1969), this Court stated that

> [i]n order to vindicate our jurisdiction to deal with this particular issue [constitutionality of the "words" portion of former §1425, subd. 16, par. d, of the New York Penal Law], we must first inquire whether the question was presented to the New York Courts in such a manner that it was necessarily decided by the New York Court of Appeals when it affirmed appellant's conviction. If the question was not so presented, then we have no power to consider it [under 28 U.S.C. §§1257(2), 1257(3)]. *Moreover, this Court has stated that when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.* [Citations omitted]. (Emphasis added).

And see, Bailey v. Anderson, 326 U.S. 203, 206-207 (1945); *Chicago, I.&L.R. Co. v. McGuire*, 196 U.S. 128, 131-133, 413 (1905); *Wilson v. Cook*, 327 U.S. 474, 480-482 (1946) ("We can consider only the federal questions passed upon the State Supreme Court").

In the case at bar, proper inquiry into whether appellant presented the constitutionality of N.C.G.S. §50-16.8(e) in such a manner that it was necessarily decided by the North Carolina Supreme Court when it dismissed appellant's appeal "for lack of [a] substantial constitutional question"

compels a negative response for several reasons. First, appellant did not raise the constitutional issue at the trial level. Although he had been given no notice of the temporary alimony hearing and was therefore not present to raise the issue of lack of notice, appellant should have—upon receipt of the alimony order—raised the constitutionality of the statute by way of a motion for relief, pursuant to the provisions of Rule 60(b)(6), North Carolina Rules of Civil Procedure.[5]

Second, appellant failed to raise the constitutionality of the statute at the time he grouped his exceptions and assignments of error to the North Carolina Court of Appeals.[6] The only assignment of error to the Court of

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[5]"On motion and upon such terms as are just, the court may relieve a party of his legal representative from a final judgment, order or proceeding for the following reasons:

* * * * * *

(6) any other reason justifying relief from the operation of the judgment."

[6]Rule 10(a), North Carolina Rules of Appellant Procedure, provides as follows:

> (a) Functioning in Limiting Scope of Review. Except as otherwise provided in this Rule 10, the scope of review on appeal is confined to a consideration of those exceptions set out and made the basis of assignments of error in the record on appeal in accordance with this Rule 10. No exception not so set out may be made the basis of an assignment of error, and no exception so set out which is not made the basis of an assignment of error may be considered on appeal. Provided, that upon any appeal duly taken from a final judgment any party to the appeal may present for review, by properly raising them in his brief, the questions whether the judgment is supported by the verdict or by the findings of fact and conclusions of law, whether the court had jurisdiction of the subject matter, and whether a criminal charge is sufficient in law, notwithstanding the absence of exceptions or assignments of error in the record on appeal.

Appeals which is even tangentially related to the issue presented to this Court provides:

> I. The trial court committed prejudicial error in conducting a hearing upon the defendant's motion for temporary alimony in that the answer and counterclaim was never properly served upon the plaintiff and in that the plaintiff was not given notice of the hearing.
>
> EXCEPTION NO. 1 (R. p. 21)

(Record on Appeal, p. 29).

Third, appellant did not raise the constitutionality of §50-16.8(e) in his brief to the Court of Appeals. The issue presented to that Court for review was:

> Did the court err in conducting an alimony pendente lite hearing as the plaintiff appellant did not have notice of said hearing.

(Plaintiff Appellant's Brief to the North Carolina Court of Appeals, p. 1). Appellant's three page discussion of this issue did little more than quote the well known language from *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), as well as Strong's, 3 N.C. INDEX 3rd. *Cf., Charleston Federal S.& L. Ass'n. v. Alderson*, 324 U.S. 182, 185 (1945): "It is essential to our jurisdiction on appeal . . . that there be an *explicit and timely insistence in the state courts that a state statute, as applied, is repugnant to the federal constitution* . . ." (Emphasis added).

Fourth, appellant's direct appeal to the North Carolina Supreme Court made no mention whatsoever regarding the constitutionality *vel non* of N.C.G.S. §50-16.8(e). *A fortiori*, appellant has raised that issue for the first time in this Court. (Brief of Appellant, p. 13). *Cf., VanHuffel v. Harkelrode*, 284 U.S. 225 (1931). In *VanHuffel*, petitioner contended that the order of the Bankruptcy Court authorizing a sale free from incumbrances was void as against the state for lack of notice and opportunity to be heard. Mr. Justice Brandeis, writing for a unanimous court, discharged the writ of certiorari after holding that

> [w]e have no occasion to pursue the argument. So far as appears, neither of these objections was made by the treasurer below, nor were they discussed by any of the state courts. They cannot, therefore, be urged here.

Id. at 229. *And see, Wilson v. Cook, supra; Street v. New York, supra; Walters v. City of St. Louis Mo.*, 347 U.S. 231, 233 (1954); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-435 (1940); *Slagle v. State of Ohio*, 366 U.S. 259, 264 (1961); *Musser v. State of Utah*, 333 U.S. 95, 98 (1948); *State Farm Mut. Automobile Ins. Co. v. Duel*, 324 U.S. 154, 160 (1945); *Charleston Federal S.&L. Ass'n. v. Alderson, supra; Raley v. State of Ohio*, 360 U.S. 423, 434-435 (1959).

In short, this Court has shown no hesitancy to refuse to decide a cause which was neither presented to, nor ruled upon, by the highest state appellate court. Because the appellant herein has not—indeed cannot—meet his affirmative obligation under *Street v. New York, supra*, appellee respectfully contends that this Court should dismiss this appeal.

II.

N.C.G.S. §50-16.8 MEETS THE DUE PROCESS REQUIREMENTS OF THE FOURTEENTH AMENDMENT, BOTH ON ITS FACE, AND AS APPLIED.

In order for this Court to properly analyze the issue presented by appellant, appellee respectfully suggests dual lines of inquiry which often overlap, but which ultimately provide the necessary resolution of the controversy. First, a general inquiry into the particular circumstances of this case, including the nature of the private and governmental interests affected. Second, a detailed inquiry into whether N.C.G.S. §50-16.8(e) meets the applicable due process standards enunciated by this Court when viewed in the light of the particular circumstances of the instant case, including the private and governmental interests affected.

A. The particular circumstances of the case, including the governmental and private interests affected—

Although "[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause", *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950), it is now settled law that: due process does not require a hearing "in every conceivable case of government impairment of private interest", *Cafeteria Workers v. McElroy*, 367 U.S. 886, 894 (1961), and see *Stanley v. Illinois*, 405 U.S. 645, 650 (1972); "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable

situation"; and that "consideration of *what procedures due process may require under any given set of circumstances* must begin with a determination of the *precise nature of the governmental function involved as well as of the private interest that has been affected* by governmental action". *Cafeteria & Restaurant Workers Union v. McElroy, supra,* at 895 (emphasis added). *And see Goldberg v. Kelly*, 397 U.S. 254, 263 (1970).

First then, the "given set of circumstances" in the instant case. Appellant filed his complaint on December 21, 1977, alleging that he was a citizen and resident of Forsyth County, North Carolina, and further alleging that because of his wife's mental illness, custody and control of the minor child born of the marriage should be awarded to him (A. p. 3). The Complaint and Summons were served on the wife the same day, immediately prior to commencement of other court proceedings held for the purpose of ruling on appellant's Petition to have his wife involuntarily committed to a mental hospital (A. p. 6). At the time of filing appellant also obtained an *ex-parte* order giving him temporary custody of the minor child (A. p. 8).

After having obtained an extension of time to answer or otherwise plead, the wife served upon appellant—on February 17, 1977—an answer and counterclaim. Based upon the allegations contained in the counterclaim the wife prayed, *inter alia*, for an award of temporary alimony (A. p. 27). Thus, despite appellant's declarations to the contrary,[7] appellant had notice of his wife's alimony claim

[7] "Nor did any of appellee's responsive pleadings convey any indication that she contemplated applying for alimony *pendente lite.*" (Brief of Appellant, pp. 24–25).

at least as early as February 19, 1978.[8] The situation is, therefore, quite unlike the situation with which petitioner was faced in *Armstrong v. Manzo*, 380 U.S. 545 (1965). There the natural mother and her new husband took all preliminary steps necessary for adoption, and ultimately secured a final decree of adoption of petitioner's daughter, all without the petitioner having "the slightest inkling of the pendency of these adoption proceedings". *Id.* at 548. *See also, Fuentes v. Shevin*, 407, U.S. 67, 75 (1972) ("Thus, at the same moment that the defendant receives the Complaint seeking possession of the property through court action, the property is seized from him."); *North Georgia Finishing v. Di-Chem*, 419 U.S. 601, 604 (1975) ("Simultaneous with the filing of the Complaint and *prior to its service on petitioner*", the Clerk of Court "forthwith issued summons of garnishment to the bank") (emphasis added).

On February 18, 1978 appellant was served with an order (A. p. 12) requiring him to allow his wife to have visitation with the minor child on Sunday, February 19, and Wednesday, February 22, and "on each and every Sunday and Wednesday thereafter . . .". At none of the appointed times did appellant appear with the child. Thereafter, Mrs. Fungaroli was served with a summons and verified petition signed by appellant seeking custody of the minor child in

[8]After obtaining an extension of time to reply, appellant's reply to the counterclaim was served on March 15, 1978. Furthermore, the trial court found as a fact that the appellant "left the State of North Carolina, and carried with him the minor child . . . after he field the instant action, *and after the defendant had answered and counterclaimed for alimony, alimony pendente lite*, and custody . . . and after this court had entered an Order herein . . . requiring the plaintiff to allow the defendant to visit with her minor child . . ." (A. p. 40).

the Juvenile and Domestic Relations Court of the City/County of Fairfax, Virginia. The verified petition, which was dated February 21, 1978 (A. p. 19) alleged that the appellant and child both resided at 7225 Braddock Road, Springfield, Virginia (A. p. 17).[9]

Thus, at the time the March 1 motion for temporary alimony was made by counsel for appellee, counsel—and the court—were faced with the following set of "circumstances": appellant had, by his own sworn petition, left the State of North Carolina, taking the minor child with him, and leaving no support for his wife who had just been released from the hospital (A. pp. 40–41), and who had monthly living expenses of approximately $731.00 (A. p. 34). Finally, and most importantly, counsel for appellee was advised by appellant's North Carolina business partner that appellant was contemplating the transfer of all his North Carolina assets to his father, a Virginia resident, for the sole purpose of thwarting any alimony order which might be forthcoming.[10] For all these reasons, especially the last, no notice was given appellant of appellee's motion for temporary alimony. *See*, N.C.G.S. §50-16.8(e). *Cf.*,

[9]Appellant thereafter filed yet another action in Virginia seeking annulment of the marriage. Although the wife was unable to attend the hearing therein because of her medical condition, the trial court nevertheless granted the annulment. On appeal the Virginia Supreme Court affirmed. Relying on the Virginia affirmance, appellant has moved for summary judgment on the issue of temporary and permanent alimony in the North Carolina trial court. Arguments on the motion are now scheduled for the week of March 25, 1980.

[10]Appellee subsequently sued appellant to set aside the fraudulent conveyance. Appellee took the deposition of the partner. He testified, in substance, that appellant had indeed transferred his partnership interest to his father in explicit derrogation of the terms of the partnership agreement.

Mitchell v. W. T. Grant, 416, U.S. 600, 609 (1974):

> An important factor in this connection is that . . . the seller's vendor's lien expires if the buyer transfers possession. It follows that if the vendor is to retain his lien . . . it is imperative when default occurs that the property be sequestered in order to foreclose the possibility that the buyer will sell or otherwise convey the property to third parties against whom the vendor's lien will not survive. *The danger of destruction or alienation cannot be guarded against if notice and a hearing before seizure are supplied. The notice itself may furnish a warning to the debtor acting in bad faith.*

(Emphasis added). And *compare* N.C.G.S. § §50-16.8(e); 50-16.7(e) ("the remedies of attachment and garnishment . . . shall be available in actions for alimony or alimony pendente lite as in other cases, *and for such purposes the dependent spouse shall be deemed a creditor of the supporting spouse*") (emphasis added); 50-16.7(h) ("*a dependent spouse* for whose benefit an order for the payment of . . . alimony pendente lite has been entered *shall be a creditor* within the meaning of Article 3 of Chapter 30 of the General Statutes relating to fraudulent conveyances") (emphasis supplied), *with Sniadach v. Family Finance Corp.*, 395 U.S. 337, 339 (1969):

> [I]n the present case *no situation requiring special protection to a state or creditor interest* is presented by the facts; *nor is the Wisconsin statute narrowly drawn to meet any such unusual condition. Petitioner was a resident of this Wisconsin community* and in personam jurisdiction was readily obtainable. (Emphasis added).

The respective interests of the parties and the state were thus known to the trial judge at the time that he, in his

discretion,[11] concluded that notice was unnecesary. On the one hand both the state and the appellee had a legitimate interest in assuring that any alimony which might be ordered would be paid, that appellant not be allowed to defeat such a right through the mechanism of a fraudulent conveyance, and that appellee not therefore be forced onto the state's welfare rolls in order to live. On the other hand, appellant argues nothing more than that his "rights" were violated when he was given no notice of the hearing itself.[12] He does not—indeed cannot—now claim that he had: not left the state; not abandoned his wife; and not transferred his North Carolina assets beyond the reach of the North Carolina courts. Nor does he now claim that his income—prior to the transfer of his assets—was insufficient to pay the alimony ordered. In short, appellant makes no showing of how his "rights" would have been protected had he been given prior notice and an opportunity to be heard. And since he has made no payments to date under the order,[13] he has not, as a practical matter, been "deprived" of anything.

B. N.C.G.S. §50-16.8(e) meets the due process standards previously enunciated by this Court—

Having thus reviewed the "given set of circumstances" and the "nature of the government function involved as well

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[11]Appellee does not read the "no notice" provision of §50-16.8(e) to be mandatory upon the trial judge.

[12]As discussed *supra*, appellant did have notice of his wife's claim for temporary and permanent alimony.

[13]Under North Carolina law an appeal does not authorize violation of such an order. *Upton v. Upton*, 14 N.C. App. 107, 187 S.E.2d 387 (1972).

as of the private interest that has been affected by governmental action", *Cafeteria Workers v. McElroy, supra* at 895, there remains for the Court's consideration only the question of whether, given the circumstances heretofore canvassed, N.C.G.S. §50-16.8(e) meets at least minimal due process standards heretofore outlined by the Court.

First, it will be noted that a recurrent strain running through most of the cases in which this court has required notice and hearing prior to seizure has been the fact that "bare assertion [or conclusiory allegations] of the party" seeking relief has been sufficient in and of itself for the clerk to grant the relief sought. *E.g., Fuentes v. Shevin*, 407 U.S. 67, 73-75 (1972); *North Georgia Finishing v. Di-Chem*, 419 U.S. 601, 607 (1975); *Armstrong v. Manzo*, 380 U.S. 545, 547 (1965); *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 338 (1969) (garnishment summons issued "at the request of the creditor's lawyer").

The North Carolina statute followed in this case mandates a considerably different procedure. N.C.G.S. §50-16.8(e) permits the trial judge—as opposed to a court functionary—to dispense with notice only where there is a finding that "the supporting spouse shall have abandoned[14] the dependent spouse and left the State, or shall be in parts unknown, or is about to remove or dispose of his or her property for the purpose of defeating the claim of the dependent spouse". *Cf., Mitchell v. W. T. Grant Co.,*

[14]Pursuant to the provisions of N.C.G.S. §50-16.2(4), one spouse abandons the other where he or she brings their cohabitation to an end without justification, without the consent of the other spouse and without any intent of renewing it. *Panhorst v. Panhorst*, 277 N.C. 664, 178 S.E.2d 387 (1971); *Bowen v. Bowen*, 19 N.C. App. 719, 200 S.E.2d (1973).

supra, 416 U.S. at 616-617. *See also, Sniadach v. Family Finance Corp., supra*, 395 U.S. at 339 ("[n]o situation requiring *special protection to a state or creditor interest* is presented by the facts; nor is the Wisconsin statute *narrowly drawn* to meet any such unusual condition") (emphasis added). Moreover, in the instant case the appellant himself, by filing his new custody action in Virginia, provided the North Carolina trial judge with the "documentary proof", *Mitchell* at 617-618, necessary for a determination that he had fled the jurisdiction of the North Carolina courts some four days after he had been served with his wife's claim for temporary and permanent alimony. True that there was not, *at the time*, any *documentary* proof of an impending fraudulent conveyance; the ends of justice and protection of legitimate creditor interests would be poorly served, however, if the court were forced to wait until the debtor had actually conveyed the property and fled the state, thereby placing both himself and his property beyond the court's reach. To reiterate, "[t]he notice itself may furnish a warning to the debtor acting in bad faith". *Id.* at 609. Moreover, in *Mitchell*, this Court was concerned not only with the question of "whether the buyer, with possession and power over the property, will destroy or make away with the goods". but also the fact that "the buyer in possession of consumer goods will undeniably put the property to it's intended use, and the resale value . . . will steadily decline as it is used over a period of time". *Id.* at 608. The interests of the creditor-wife in the instant case are more compelling: transfer of her husbands assets would defeat the very purpose of temporary alimony, *i.e.*, provide her with the means to subsist during the pendency of the lawsuit. N.C.G.S. §50-16.3(2). Stated otherwise, notice to the supporting spouse, under circumstances such as exist in

this case, "may drive a [dependent spouse] to the wall". *Sniadach v. Family Finance Corp., supra*, 395 U.S. at 341-342.

Second, and perhaps more importantly, the "usual rule" on the prior notice and hearing cases has been that

> [w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate. Phillips v. Commissioner, 283 U.S. 589, 596-597, 75 L.Ed. 1289, 51 S.Ct. 608 (1931). See also, Scottish Union v. National Ins. Co. v. Bowland, 196 U.S. 611, 632, 49 L.Ed. 619, 25 S.Ct. 345 (1905); Springer v. United States, 102 U.S. 586, 593-594, 26 L.Ed. 253 (1881).

Mitchell v. W. T. Grant Co., supra, at 611-612. *And see Ewing v. Mytinger & Casselberry*, 339 U.S. 594 (1950).

Prior to 1961, "judicial enquiry" on an application by the wife for temporary[15] alimony was limited to the question of whether "the wife is without sufficient means to cope with her husband in presenting their case before the court". *Oliver v. Oliver*, 219 N.C. 299, 13 S.E.2d 549, 555 (1941); *Brannon v. Brannon*, 247 N.C. 77, 100 S.E.2d 209, 211 (1957). This limitation followed from the wife's "common law *right* . . . without statutory aid", *Medlin v. Medlin*, 175 N.C. 529, 95 S.E. 857, 858 (1918) (emphasis added), to have the husband "furnish the necessary funds to enable her to so defend the action as to bring about a fair investigation of the charges and a just determination of the issues". *Holloway v. Holloway*, 213 N.C. 662, 200 S.E. 436, 437 (1939). And the wife "will not be deprived of the

[15]N.C.G.S. §50-16.3(6) provides that alimony pendente lite "shall be limited to the pendency of the suit in which the application is made".

support due her from her husband until a jury has determined the issue adversely to her in a trial in which she has had a fair opportunity, and reasonable means with which, to defend herself". *Id. And see generally, Note, Domestic Relations—Basis of the Award of Alimony Pendente Lite in North Carolina*, 39 N.C.L. Rev. 189 (1961).

Thus, under North Carolina common law,[16] as well the present statutory procedure, ultimate judicial determination of liability is "postponed" until trial on the merits, and temporary alimony is for the sole purpose of allowing the dependent spouse to maintain herself pending final determination of the issues. *Gardner v. Gardner*, 40 N.C. App. 334, 252 S.E.2d 867 (1979).

In the instant action appellant himself thwarted the "ultimate judicial determination of liability". *Mitchell v. W. T. Grant, supra*. Not only did he, for all practical purposes, abandon the North Carolina action he had himself instituted, making no request or attempt to place the action on the "ready" trial calendar, *see* North Carolina Rules of Practice for Superior and District Courts, Rule 2 (d), (e); he also asked for—and obtained—a continuance on each of those occasions when appellee attempted to bring the matter to trial. It is thus the wife's contention that her husband—who has contributed nothing to her support since December of 1977—should not now be heard to complain that the "ultimate judicial determination of liability is [in]adequate". *Id.* at 611.

To summarize, when N.C.G.S. §50-16.8(e) is considered in light of the North Carolina alimony procedure

[16]As to the principle that subsequent legislation has not abrogated the common law, see *Medlin v. Medlin, supra.*

generally, it is clear that North Carolina has reached a constitutional accommodation of the respective interests of dependent and supporting spouses. The statute is narrowly drawn to protect a legitimate state and/or creditor interest; notice may be dispensed with only upon an adequate showing made to the trial judge, as opposed to a court functionary; and the supporting spouse may at any time bring the action on for a full hearing or trial at any time after the order is entered. In these circumstances appellant has not been deprived of due process.

CONCLUSION

For the foregoing reasons appellee respectfully submits that this Court should dismiss this appeal inasmuch as it was neither raised nor decided in the courts below. Alternatively, appellee submits that this Court should hold N.C.G.S. §50-16.8(e) to be constitutional, both on its face, and as applied.

Respectfully submitted,

/s/ B. Ervin Brown, II
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APPENDIX A

No. 7821DC1109
NORTH CAROLINA COURT OF APPEALS
Filed: 2 October 1979

ROBERT MICHAEL FUNGAROLI

v.

JUDITH DIANE FUNGAROLI

Forsyth County
No. 77CVD4340

Appeal by plaintiff from Freeman, Judge. Order entered 8 August 1978 in District Court, Forsyth County. Heard in the Court of Appeals 22 August 1979.

This is a civil action brought by plaintiff-father against defendant-mother to obtain custody of the minor child of the parties, Derek Cassidy Fungaroli, born 19 May 1977. Defendant filed answer resisting the complaint, alleging that she was a fit and proper person and plaintiff was not a fit and proper person to have custody of the child, and praying that custody be awarded to her. She also prayed for alimony without divorce and alimony *pendente lite.* After entry of varioius interlocutory orders not pertinent to the questions raised by the present appeal, [On a previous appeal this Court affirmed interlocutory orders awarding defendant alimony *pendente lite* and adjudging plaintiff in contempt for violating an order allowing defendant visitation privileges with the child. Fungaroli v. Fungaroli, 40 N.C. App. 397, 252 S.E.2d 849 (1979), *appeal dismissed*, 297 N.C. 452 (1979).] the matter was heard before District Judge William H. Freeman on the issue concerning custody of the child.

After hearing on the merits, Judge Freeman entered an order dated 1 June 1978, making findings of fact from which the court concluded that both plaintiff and defendant were fit and proper persons to have custody and visitation privileges with the child but that "it would be within the best interests of the welfare" of the child that his custody be placed with the plaintiff. Accordingly, the court awarded custody to the plaintiff and awarded defendant visitation rights on the first and third weekends of each month, for the entire month of July, and the week following Christmas of each year. There was no appeal from this order.

The matter giving rise to the present appeal was initiated on 31 July 1978, when the defendant filed a motion in the cause in which, among other matters, she alleged that plaintiff had given evidence during the prior hearings that he was residing in Springfield, Virginia, and caring for the child, but that plaintiff in fact had continued to live and work in Forsyth County. She also alleged:

> (9) That the defendant is informed, believes and therefore alleges that the plaintiff has not exercised the control and proper care for the needs of the minor child; that in truth and in fact, the minor child has been placed in the custody of the plaintiff's parents;
>
> (10) That the defendant is informed, believes and therefore alleges that for the Court to place the child in the custody of the grandparents would be in error since both the plaintiff and defendant were found to be fit and proper persons to have the care, custody and control of the said minor child.

Defendant moved that primary custody of the child be placed with her, "pending a hearing of this motion."

On 7 August 1978 District Judge Freeman conducted a hearing on defendant's motion. At this hearing both plaintiff

and defendant appeared and testified and presented other evidence. Following this hearing, the court entered an order dated 8 August 1978 in which the court found that there had been a material change in circumstances affecting the welfare of the child and ordered that custody be placed with the defendant-mother with the plaintiff-father being granted visitation rights. From this order plaintiff appeals.

John F. Morrow and N. Lawrence Hudspeth for plaintiff appellant.

Harold R. Wilson and John W. Sherrill for defendant appellee.

PARKER, Judge. Plaintiff assigns as error the trial court's ruling that the purpose of the 7 August 1978 hearing was to determine if there had been a substantial change in circumstances since the 1 June 1978 order sufficient to warrant a change in the award of custody. He contends that no notice was given by defendant's motion of any changed circumstances and that he was, therefore, without notice of the facts intended to be proved or of the relief sought. We find no error in the court's ruling.

"Changed circumstances do not have to be pled with specificity." *White v. White*, 296 N.C. 661, 670, 252 S.E.2d 698, 703 (1979); accord Elmore v. Elmore, 4 N.C. App. 192, 166 S.E.2d 506 (1969). In *White*, plaintiff sought an increase in support payments and alleged only that defendant's income had increased and that the monthly payments originally provided were "totally inadequate under the current circumstances." These allegations were held sufficient to withstand a motion to dismiss under Rule 12(b)(6). In the present case, while defendant's motion may not have been altogether artfully drawn, its allegations taken as a whole make it clear that defendant was contending that since the date of the earlier hearing plaintiff

had "not exercised the control and proper care for the needs of the minor child" because, contrary to his expressed intent as stated at the prior hearing, he had continued to live in Winston-Salem while the child remained with plaintiff's parents in Virginia. By these allegations plaintiff was given sufficient notice of the facts which defendant intended to prove. As for the relief sought, defendant's motion expressly requested that the court place primary custody of the child with her "pending a hearing" of her motion, and while the better practice would have been for her also to have prayed expressly for primary custody on a more permanent basis, there could have been no reasonable doubt that permanent custody was the actual relief which she was seeking. Plaintiff's first assignment of error is overruled.

Plaintiff assigns as error the trial court's admission of evidence concerning plaintiff's conduct prior to the order of 1 June 1978. In a hearing on modification of a custody order, the issue is whether there has been a substantial change in circumstances affecting the welfare of the child since the earlier order. "A decree of custody is entitled to such stability as would end the vicious litigation so often accompanying such contests, unless it be found that some change of circumstances has occurred affecting the welfare of the child so as to require modification of the order. To hold otherwise would invite constant litigation by a dissatisfied party so as to keep the involved child constantly torn between parents and in a resulting state of turmoil and insecurity." Shepherd v. Shepherd, 273 N.C. 71, 75, 159 S.E.2d 357, 361 (1968). In the present case, the trial judge permitted defendant's counsel to question plaintiff concerning his residence during the period prior to the order of 1 June 1978. However, the court stipulated that it would

consider the evidence for impeachment purposes only. A witness may be impeached by proof that he has made a statement at a former hearing that is inconsistent with his testimony at the present hearing or that his conduct was inconsistent with that earlier testimony. 1 Stansbury's N.C. Evidence (Brandis Rev.) §46. The issue of plaintiff's residence and his exercise of custody or control over the minor child after the date of the last custody order was directly before the court in the hearing on 7 August 1978, and the judge could properly consider evidence of his whereabouts prior to the previously entered custody order in determining his credibility as a witness.

In his Assignment of Error No. 6, plaintiff contends that defendant was improperly permitted to impeach her own witness, Jerry Casar. "[T]he rule that one may not impeach his own witness was modified in respect of civil cases by the adoption of G.S. §1A-1, Rule 43(b) of the North Carolina Rules of Civil Procedure." State v. Pope, 24 N.C. App. 644, 646, 211 S.E.2d 841, 842 (1975) aff'd, 287 N.C. 505, 215 S.E.2d 139 (1975). In pertinent part G.S. §1A-1, Rule 43(b) provides: "A party may interrogate an unwilling or hostile witness by leading questions and may contradict and impeach him in all respects as if he had been called by the adverse party." There can be no question but that Jerry Casar was an unwilling witness in this case. When questioned by defendant's counsel on direct examination, he admitted that he was unwilling to testify, stating: "I do not wish to become part of this ordeal, put it that way, I have a job, you know." In view of the witness's clearly expressed unwillingness to testify, defendant's counsel had the right under Rule 43(b) to ask him leading questions and to impeach him. This assignment of error, therefore, is overruled.

Plaintiff also contends that the court erred in admitting into evidence twenty-eight United Parcel Service Delivery records and in permitting the custodian of the records to testify concerning them when he had no personal knowledge of the facts shown by their contents. Before business records may be admitted into evidence, they must be authenticated by a witness who is familiar with them and the system under which they were made. 1 Stansbury's N.C. Evidence (Brandis Rev.) §155. In the present case, Norman Smith, District Loss Prevention Supervisor for United Parcel Service, testified that the records with which we are here concerned were kept under his supervision and explained how the records reflected the delivery point for parcels. That the witness failed to testify as to the procedure for final delivery of the parcels to their destination and to testify unequivocally that the signature of the person signing the receipts for the parcels was always obtained only at the point of delivery goes to the weight to be given these records rather than to their admissibility. We find no error in admitting these records into evidence.

Finally, plaintiff contends that the trial judge found no facts which support a finding of changed circumstances adversely affecting the welfare of the child. It is true that a change of residence alone does not show a substantial change of circumstances within the meaning of G.S. 50-13.7(a). Harrington v. Harrington, 16 N.C. App. 628, 192 S.E.2d 638 (1972). In the present case, however, there was more than a mere change of residence. In its order of 1 June 1978, the court found that plaintiff began living with his parents in Springfield, Virginia, some time after 5 December 1977 and exercised custody of the child there. At the time of the prior hearing plaintiff expressed an intent to remain living in Virginia. In its order of 8 August 1978,

the court found that plaintiff was living and working in Winston-Salem and that his parents had exercised the primary custody and control of the minor child. Plaintiff's failure to remain living in Virginia and to continue to exercise primary custody and control over the child adequately supports the court's conclusion that there had been a substantial change in circumstances affecting the welfare of the child. The trial judge did not err in awarding custody to the defendant-mother.

Affirmed.

Chief Judge MORRIS and Judge MARTIN (Harry C.) concur.

Report per Rule 30(e).

APPENDIX B

STATE OF NORTH CAROLINA
County of Forsyth

File # 80CR-2783
File #

The State of North Carolina
vs.
Betty S. Fungaroli
Defendant

In The General Court of Justice
Superior Court Division

INDICTMENT
TRANSPORTING CHILD OUTSIDE THE STATE WITH INTENT TO VIOLATE CUSTODY ORDER

THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 18th day of August, 1978, in Forsyth County Betty S. Fungaroli unlawfully and wilfully did feloniously take and transport and keep one Derek Cassidy Fungaroli, born May 19, 1977, a child under the age of sixteen years from Judith D. Fungaroli, the said Judith D. Fungaroli having been awarded custody of said child by a Court of competent jurisdiction in the State of North Carolina, to wit: the Forsyth County District Court, Civil Division, by the Honorable William H. Freeman, District Court Judge, on the 8th day of August, 1978, in case number 77CVD4340; said taking and transporting and keeping was with the intent to violate the above-mentioned Order of the Court, and was from the State of North Carolina to a point outside the limits of the State of North Carolina, to wit: the State of Virginia.

Richard R Lyle
Assistant District Attorney

WITNESSES:

Harold R. Wilson

The witnesses marked "X" were sworn by the undersigned foreman and examined before the grand jury, and this bill was found to be ☐ a true bill by twelve or more grand jurors ☐ not a true bill.

This ____ day of _____, 19__. That the undersigned foreman hereby attests that 12 or more Grand Jurors concurred in the finding of this True Bill of Indictment.

Grand Jury Foreman

AOC-L Form 201
Rev. 10/76

STATE OF NORTH CAROLINA
County of Forsyth

File # 78CR-27781
Film #

In The General Court of Justice
Superior Court Division

The State of North Carolina
vs.
Robert Michael Fungaroli
Defendant

INDICTMENT
TPANSPORTING CHILD OUTSIDE THE STATE WITH INTENT TO VIOLATE CUSTODY ORDER

THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 18th day of August, 19 78, in Forsyth County Robert Michael Fungaroli unlawfully and wilfully did feloniously take and transport and keep one Derek Cassidy Fungaroli, born May 19, 1977, a child under the age of sixteen years from Judith D. Fungaroli, the said Judith D. Fungaroli having been awarded custody of said child by a Court of competent jurisdiction in the State of North Carolina, to wit; the Forsyth County District Court, Civil Division, by the Honorable William H. Freeman, District Court Judge, on the 8th day of August, 1978, in case number 77CVD4340; said taking and transporting and keeping was with the intent to violate the above-mentioned order of the Court, and was from the State of North Carolina to a point outside the limits of the State of North Carolina, to wit; the State of Virginia.

Richard R Eyle
Assistant District Attorney

WITNESSES:

Harold R. Wilson

The witnesses marked "X" were sworn by the undersigned foreman and examined before the grand jury, and this bill was found to be ☒ a true bill by twelve or more grand jurors ☐ not a true bill.

This ____ day of _____, 19___. That the undersigned Foreman hereby attests that 12 or more Grand Jurors concurred in the finding of this True Bill of Indictment.

Grand Jury Foreman

AOC-L Form 201
Rev. 10/76

STATE OF NORTH CAROLINA
County of Forsyth

File # 78CR-27782
Film #

In The General Court of Justice
Superior Court Division

The State of North Carolina
vs.
Michael A. Fungaroli
Defendant

INDICTMENT
TRANSPORTING CHILD OUTSIDE THE STATE WITH INTENT TO VIOLATE CUSTODY ORDER

THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 18th day of August, 19 78, in Forsyth County Michael A. Fungaroli unlawfully and wilfully did feloniously take and transport and keep one Derek Cassidy Fungaroli, born May 19, 1977, a child under the age of sixteen years from Judith D. Fungaroli, the said Judith D. Fungaroli having been awarded custody of said child by a Court of competent jurisdiction in the State of North Carolina, to wit; the Forsyth County District Court, Civil Division, by the Honorable William H. Freeman, District Court Judge, on the 8th day of August, 1978, in case number 77CVD4340; said taking and transporting and keeping was with the intent to violate the above-mentioned Order of the Court, and was from the State of North Carolina to a point outside the limits of the State of North Carolina, to wit; the State of Virginia.

Richard R Eyle
Assistant District Attorney

WITNESSES:

Harold R. Wilson

The witnesses marked "X" were sworn by the undersigned foreman and examined before the grand jury, and this bill was found to be ☒ a true bill by twelve or more grand jurors ☐ not a true bill.

This ____ day of _____, 19___. That the undersigned Foreman hereby attests that 12 or more Grand Jurors concurred in the finding of this True Bill of Indictment.

Grand Jury Foreman

AOC-L Form 201
Rev. 10/76